Date: March 7, 1997
Case No.: 95-INA-323

In the Matter of:

LUCIA YOUNG,
Employer

On Behalf Of:

ESTRELLA TESTON,
Alien

Appearance: James J. Orlow, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 14, 1994, Lucia Young ("Employer") filed an application for labor certification to enable Estrella Teston ("Alien") to fill the position of Cook (AF 22). The job duties for the position are:

> Plans menus and cooks meals in private home according to recipes or tastes of elderly couple. Cleans kitchen and cooking utensils. Serves meals and assists couple during mealtime. Must have verifiable references.

The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on September 22, 1994 (AF 15), proposing to deny certification on the grounds that the Employer did not state the prevailing rate of pay in its advertisement in violation of 20 C.F.R. § 656.21(g). The CO further found that while the Employer listed that the position will require 40 hours per week on the application, the duties described by the Employer do not appear to constitute full-time employment in violation of 20 C.F.R. § 656.3. The CO notified the Employer that it could rebut the findings by providing documentation that the position was advertised with the prevailing wage, and that the duties require full-time employment.

In its rebuttal, dated December 21, 1994 (AF 5), the Employer contended that it had readvertised the position at the prevailing wage of $10.71 per hour, and included a tear sheet from the Philadelphia Daily News on October 28, 1994 (AF 7). The Employer also contended that the U.S. applicant who applied for the position was rejected for lawful, job-related reasons. The Employer also submitted a one-page explanation regarding the duties, stating that the position is required to plan, cook, and serve three meals per day, purchase and store the groceries, and clean the kitchen area. The person is also required to cook and store foods for the two days he/she is not scheduled to work (AF 9).

The CO issued the Final Determination on January 4, 1995 (AF 2), denying certification because the Employer's rebuttal is insufficient to justify full-time employment.

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On January 25, 1995, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and on February 22, 1995, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Twenty C.F.R. § 656.50 (now recodified as § 656.3) requires that "Employment" means full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that the position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988). If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989). A CO's finding that a job is not permanent or full time must have some foundation. *Han Yang Sewing Machine Co.*, 88-INA-207 (June 29, 1989).

In this case, the CO requested that the Employer document how the position was permanent and full-time. The Employer noted in rebuttal that the position is to plan, prepare, and serve meals to an elderly couple on a daily basis, for six to seven hours per day, five days per week. The position does not involve any cleaning, entertaining, child care, or outdoor maintenance. The Employer also noted that the position must secure the food for the meals and store meals for the days off (AF 8). The CO's denial reasoned that there was no mention of other family members, any extensive social or business schedule, no indication of special diets or foods, hands-on care, or that the Employer had maintained a cook prior to this instance (AF 3-4).

We agree with the CO that the statement provided by the Employer is insufficient to establish that a permanent, full-time position exists. The Board has held that to establish permanent, full-time employment for a household cook, the Employer must show that the position involves more than planning, preparing, and serving household meals, even up to 25 meals per week. See *Jane B. Horn*, 94-INA-6 (Nov. 30, 1994); *Marianne Tamulevich*; 94-INA-54 (Dec. 5, 1994); *Mr. & Mrs. Clifford I. Cummings*, 94-INA-8 (Dec. 21, 1994). The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of March, 1997, for the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not

favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.